

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Case No. 2:22-cr-00057-MMD-NJK

Plaintiff,

ORDER

v.

DAMIEN PATILLO,

Defendant.

I. SUMMARY

A grand jury indicted Defendant Damien Patillo on three counts: felon in possession of a firearm; possession with intent to distribute methamphetamine; and possession of a firearm in furtherance of a drug trafficking offense. (ECF No. 34.) Following a bifurcated trial, the jury convicted Defendant of possession with intent to distribute methamphetamine (count two) and acquitted him of the other two counts. (ECF Nos. 170, 174.) Before the Court are Defendant's motion for judgment of acquittal (ECF No. 178) and motion for new trial (ECF No. 179).¹ As further explained below, the Court denies both motions.

II. DISCUSSION

A. Motion for Judgment of Acquittal (ECF No. 178)

Defendant argues the government failed to prove the element of intent to distribute beyond a reasonable doubt to support a conviction for possession with intent to distribute methamphetamine.² (ECF No. 178 at 5.) Defendant insists the evidence offered,

¹The government filed responses (ECF Nos. 194, 195) and Defendant filed replies (ECF No. 196, 197). Defendant supplemented his initial motion for new trial with citations to the record. (ECF No. 186.)

²Defendant moved for judgment of acquittal under Fed. R. Crim. P. 29(a) at the close of the government's case, and the Court denied the motion. (ECF No. 165.)

1 consisting of his possession of 16 baggies of methamphetamine and DEA special agent
2 (“SA”) Nestor’s testimony as to indicia of drug distribution, is insufficient to support the
3 jury’s verdict when other evidence (i.e., syringes found on Defendant and testimony from
4 officers that syringes were of a kind user would use to inject methamphetamine) indicates
5 personal use. (*Id.* at 5-6; ECF No. 196 at 2-4.) The government’s response points to
6 evidence that supports the jury’s verdict: Defendant possessed methamphetamine (21
7 grams broken down into individually wrapped baggies of various sizes) and SA Nestor’s
8 testimony that a user generally possess one or two “teener” bags (1.75 grams) of
9 methamphetamine and possibly up to five “teener” bags, and the methamphetamine that
10 Defendant had on him was still in “crystal form” not ready for ingestion. (ECF No. 194 at
11 4-5.)

12 The Court reviews Defendant’s post-verdict motion for judgment of acquittal,
13 renewing his earlier Rule 29 motion, under a sufficiency of the evidence standard. See
14 *United States v. Gonzalez*, 528 F.3d 1207, 1211 (9th Cir. 2008). A criminal defendant’s
15 challenge to the constitutional sufficiency of evidence to support a criminal conviction is
16 governed by *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). *Jackson* requires a court,
17 upon such a motion, to construe the evidence “in the light most favorable to the
18 prosecution” to determine whether “any rational trier of fact could have found the essential
19 elements of the crime beyond a reasonable doubt.” *Id.* (emphasis in original). When
20 considering evidence in the light most favorable to the prosecution, “faced with a record
21 of historical facts that supports conflicting inferences, a reviewing court must presume—
22 even if it does not affirmatively appear in the record—that the trier of fact resolved any
23 such conflicts in favor of the prosecution, and must defer to that resolution.” *United States*
24 *v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc) (quoting *Jackson*, 443 U.S. at
25 326).

26 Viewing the evidence in the light most favorable to the government, a rational trier
27 of fact could have found that the government established the element of possession with
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1 intent to distribute methamphetamine beyond a reasonable doubt.³ Defendant had in his
2 possession 16 individually wrapped baggies of various sizes containing a total of 21
3 grams of methamphetamine. (Exhibits 36, 42.) As the government highlights, SA Nestor's
4 expert testimony that this quantity, the packaging of the meth in various sizes, and the
5 crystal form of the drugs are indications of distribution supporting the intent to distribute
6 element,⁴ along with SA Nestor's testimony that for personal use, an individual may have
7 one or two "teener" bags or even up to five "teener" bags in their possession—and
8 Defendant had much more. (ECF No. 194 at 4.) Defendant points to evidence that could
9 indicate personal use—he had syringes on him—and the absence of other indicia of
10 distribution—"logs, owe sheets, empty bags, scales, etc."—to argue "the evidence of use
11 of drugs was overwhelming." (ECF No. 196 at 3-4). But at best, the evidence Defendant
12 relies on as indicia of personal use provides "conflicting inferences," and the jury drew the
13 inferences in favor of a finding of distribution in convicting Defendant. And the Court must
14 "defer to [the jury's] resolution" of such conflict in favor of the prosecution. *See Nevils*,
15 598 F.3d at 1164. Accordingly, the Court denies Defendant's motion for judgment of
16 acquittal.

17 **B. Motion for New Trial (ECF No. 179)**

18 Defendant contends the Court should exercise its discretion to grant a new trial
19 under Fed. R. Crim. P. 33(a) on two grounds: lack of evidence as to his intent to distribute
20 methamphetamine; and a government witness's (Las Vegas Metropolitan Police
21 ("LVMP") Officer Shai-Anthony Lindsey-Souza ("Lindsey")) testimony that he considered
22 a subject's criminal history in determining whether to charge the subject with distribution,
23 thereby suggesting that Defendant has a criminal history. (ECF No. 179 at 4-5.) The
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25 ³Defendant's motion challenges only one element of the offense charged in count
26 one—that he possessed methamphetamine with the intent to distribute to another person.
(ECF No. 178 at 4.)

27 ⁴Defendant responds that SA Nestor's testimony that, to his knowledge,
28 methamphetamine is delivered through smoking, not injection, is contrary to testimony of
the officers who testified. (ECF No. 196 at 4.) But the jury resolved this discrepancy in
favor of finding that Defendant's possession was for distribution.

1 government responds that the evidence supports the jury's verdict and disputes
2 Defendant's characterization of the witness's testimony. (ECF No. 195.) The Court
3 generally agrees with the government.

4 Under Federal Rule of Criminal Procedure 33(a), "[u]pon the defendant's motion,
5 the court may vacate any judgment and grant a new trial if the interest of justice so
6 requires." Although determining whether to grant a motion for a new trial is left to the
7 district court's discretion, "it should be granted only in exceptional cases in which the
8 evidence preponderates heavily against the verdict." *United States v. Pimentel*, 654 F.2d
9 538, 545 (9th Cir. 1981) (citation and internal quotation marks omitted). Moreover, the
10 defendant bears the burden of persuasion. *See United States v. Endicott*, 869 F.2d 452,
11 454 (9th Cir. 1989). Such an extraordinary remedy is appropriate, for example, when a
12 court makes an erroneous ruling during the trial and that, but for that erroneous ruling,
13 the outcome of the trial would have been more favorable to the defendant. *See United*
14 *States v. Butler*, 567 F.2d 885, 891 (9th Cir. 1978).

15 As to Defendant's first ground—evidence supporting intent—the Court's reasoning
16 in denying a new trial discussed above applies here. Defendant points to absence of
17 direct evidence of intent. (ECF No. 179 at 4.) But the government did offer circumstantial
18 evidence of Defendant's intent to distribute methamphetamine, and the jury resolved any
19 conflicting evidence of personal use in favor of the government and against Defendant.
20 Moreover, the distinction between direct and circumstantial evidence is of little
21 significance in the context of this case considering the evidence of distribution. In fact, the
22 jury was instructed that "[t]he law makes no distinction between the weight to be given to
23 either direct or circumstantial evidence." (ECF No. 168 at 4.) And this instruction was
24 correct.

25 Defendant's second ground—that Lindsey improperly suggested that Defendant
26 has a criminal history—requires examination of the witness's actual testimony. Lindsey
27 was a patrol officer with LVMP at the time of Defendant's encounter with law enforcement
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1 in 2021. (ECF No. 183 at 4.) Towards the start of Lindsey's direct examination, he was
2 asked about his experience as a patrol officer:

3 Q. At the time, in 2021, were you still a patrol
officer?

4 A. That is correct.

5 Q. Okay.

I want to ask you couple questions about your
experience as a patrol officer.

6 Did you come into contact, as a patrol officer,
with individuals in possession of methamphetamine?

7 A. Yes.

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9 Q. And what is your role as a police officer - what is
your decision as a police officer when you come into
10 contact with the individual in possession of
methamphetamine?

11 A. We always have the discretion to make an arrest or
not make an arrest, to sign them up as a confidential
12 informant. Again, meaning if there was enough amount to
test and weigh, we would make an arrest with it. If there
13 was opportunity to sign them up, we would. Sometimes it
was just residue, and we would just destroy evidence and
14 gone with our ways.

Q. And not make an arrest in the last case?

15 A. Correct.

16 Q. Okay.

You mentioned making arrests. Do you as a police officer
place the charge on the individual?

17 A. Yes.

Q. How do you determine whether you're going to charge
someone with possession or distribution or dealing?

18 A. Possession is usually a much smaller amount, meaning
19 maybe just one bag, or is there burnt spoons, to torches,
to needles, meaning paraphernalia, drug paraphernalia
20 that's used to ingest the drugs. For sales or
distribution, meaning there could be multiple baggies
21 that's pre-weighted, to empty baggies to be pre-
weighted, or large amounts of cash, two different
22 denominations.

Q. As a police officer, in the first five years of your
23 career doing patrol work, is that your discretion
whether to charge one or the other?

24 A. Correct.

Q. You've made -- you referenced the amounts that you're
25 looking at and paraphernalia. Is there anything else
that you're looking at, in your five years as a police
26 officer, when determining whether to charge possession
or dealing?

27 A. Looking at that subject's record, there could be
mostly possession, meaning they're mostly a drug user.
28 Drug paraphernalia charges just to possession charges,

1 to some with both, meaning to have distribution to sales,
2 to intent to sell that drug, to just being a user.

3 (*Id.* at 5-7.) Defendant argues that because he was charged with possession with intent
4 to distribute in this case, “a juror could take this testimony on reviewing criminal history to
5 mean that Patillo had a history of distribution.” (ECF No. 197 at 3.)

6 First and foremost, Lindsey did not testify about Defendant’s history, nor did he
7 testify that Defendant has any prior convictions. The evidence also shows Lindsey was
8 not the primary officer who arrested Defendant. (ECF No. 195 at 7.) Moreover, viewed in
9 context, Lindsey testified about factors that he in general considered in exercising his
10 discretion whether to charge for possession or dealing, and he identified “a subject’s
11 record” as among several factors. (ECF No. 183 at 7.) And Lindsey did not testify, as
12 Defendant suggests, that criminal history of distribution would lead to a distribution
13 charge. Viewed in context, Lindsey’s testimony cannot be reasonably construed to infer
14 that Defendant has a criminal history, let alone a criminal history of drug distribution.

15 In sum, Defendant’s argument does not persuade the Court that his case falls into
16 the category of “exceptional cases in which the evidence preponderates heavily against
17 the verdict.” *Pimentel*, 654 F.2d at 545. Accordingly, the Court denies Defendant’s motion
18 for a new trial.

19 **III. CONCLUSION**

20 The Court notes that the parties made several arguments and cited several cases
21 not discussed above. The Court has reviewed these arguments and cases and
22 determines that they do not warrant discussion as they do not affect the outcome of the
23 motions before the Court.

24 It is therefore ordered that Defendant’s motion for judgment of acquittal (ECF No.
25 178) is denied.

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1 It is further ordered that Defendant's motion for new trial (ECF No. 179) is denied.

2 DATED THIS 1st Day of May 2025.

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MIRANDA M. DU
6 UNITED STATES DISTRICT JUDGE
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